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Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-540

WILLIAM A. MOORE, ET AL.,

....PETITIONER

V.

HAMPTON ROADS SANITATION DISTRICT COMMISSION

AND

CITY OF NEWPORT NEWS,

....DEFENDANTS

PETITION FOR WRIT OF CERTIORARI

APPEALED FROM THE FOURTH CIRCUIT
COURT OF APPEALS
RICHMOND, VIRGINIA

WILLIAM MILLS KRIEGER, ESQUIRE
714 J. CLYDE MORRIS BLVD.
NEWPORT NEWS, VIRGINIA

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

WILLIAM A. MOORE et al.,
..... Petitioner,

v.

HAMPTON ROADS SANITATION DISTRICT
COMMISSION, and
CITY OF NEWPORT NEWS,
..... Respondents

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Virginia, on a judgment n.o.v. dated March 10, 1975 is unreported, appendix page . The Fourth

Circuit panel decision and the decision en banc is reported at 557 F.2d 1030 (4th Cir. 1976).

JURISDICTION

Jurisdiction is founded upon Title 28 Section 1254 of the United States Code. Petitioners seek review of the Judgment n.o.v. entered in favor of the City of Newport News and the directed verdict in favor of Hampton Roads Sanitation by Court Order dated March 10, 1975.

QUESTIONS PRESENTED

I.

Whether interference with commercial fishing operations on navigable waters of the United States bears a significant relationship to traditional maritime activity and is thus a maritime tort?

II.

Whether the fact that the fish resources

subject to commercial fishing operations in navigable waters of the United States are owned by the Commonwealth is a sufficient basis to oust the admiralty from its traditional jurisdiction over commercial fishing operations.

III.

Whether the contamination and condemnation of the Warwick River constituted an unconstitutional taking within the purview of federal and state constitutional standards.

CONSTITUTIONAL PROVISION AND STATUES INVOLVED

Constitution of the United States

Amendment V

...nor shall private property be taken for public use, without just compensation.

Amendment XIV, §1

All persons born or naturalized in

the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of Virginia

Article I§11

That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, not any law whereby private property shall be taken or damaged for public uses, without just compensation, the term public uses to be

defined by the general assembly.

Statutes

28 U.S.C. §1331

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws,or treaties of the United States.

28 U.S.C. §1333

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

STATEMENT OF THE CASE

The petitioners claim jurisdiction under 28 U.S.C. §1331 (federal question jurisdiction) and 28 U.S.C. §1333 (admiralty and maritime jurisdiction).

The petitioners are lessess of oyster

beds located in the Warwick River, a navigable tidal stream, contiguous with the City of Newport News, Virginia. The leases are granted from the Commonwealth for a nominal price, are automatically renewable and are treated as chattels real by state law. The lessee spends substantial amounts of money in shelling and seeding his leased beds so that oysters may be cultivated, harvested and sold. The petitioners' beds were condemned for shellfishing at different times and as to different portions of the river since March 1, 1966 when the northern Warwick was condemned because of high coliform counts. (This includes the grounds of M.G. Lozaw, Byrncliffe Oyster Co. and part of Carrie Carters). The southern portion of the Warwick was closed in 1967 when the outflow pipe of the James River Sewage Treatment Plant

started operation and a "buffer zone" was created pursuant to FDA requirements. The remainder of the River was closed on the 29th day of March, 1972, because of high coliform counts.

The FDA, since the early 1920's has required that certain areas around sewage treatment plant outflow pipes be permanently condemned for shellfishing purposes. These areas are "buffer zones" which provide a margin of safety should the plant suffer a breakdown. The 1967 closing of the Warwick was the result of the creation of such a "buffer zone" for the James River Sewage Treatment Plant. The oystermen contend that they should have been compensated for the loss of their grounds when the "buffer zone" was created. It was the failure to be compensated which led to the claim against the HRSDC, owner and

operator of the JRSTP. The lessees alleged that the failure to compensate them was a taking of their property without due process of law. The court below granted HRSDC summary judgment on this issue. The circuit affirmed as HRSDC.

The leaseholders' case against the City of Newport News involved different leases in different sections of the River which were permanently closed because of real contamination. The northern section of the River has remained permanently condemned since March of 1966 because of the presence since that time of consistently high fecal coliform counts. The middle section of the River has remained permanently condemned since March of 1972 for the same reasons. The evidence presented by the lessees demonstrated that the source of the coliforms were City pumping stations and lateral sewage conduits.

It was also accepted by the jury that City negligence permitted the sewage flow into the Warwick and was the proximate cause of the continuing condemnation. The evidence presented showed that for various correctable reasons the City sewer facilities drained raw sewage into the Warwick every time it rained and at other times. The Court below granted judgment n.o.v. as to the City on three grounds. The City was not guilty of taking the property of the lessees without due process requirements being met. The City enjoyed sovereign immunity from sewage related torts. The lessess failed to notify the City of their tort claim within sixty (60) days after the claim arose. The Circuit panel reversed on grounds of admiralty jurisdiction with respect to Newport News, but en banc affirmed.

SUMMARY OF
ARGUMENT FOR ALLOWANCE OF WRIT

The Fourth Circuit Court of Appeals in the case at hand has refused to apply the test of maritime jurisdiction as enuciated in Executive Jet Aviation v. Cleveland, Ohio 409 U.S. 249 (1972). Executive Jet and lower courts have indicated that where a wrong bears a significant relationship to traditional maritime activity, admiralty jurisdiction exists. Union Oil Co. v. Oppen, 501 F.2d 558, 560-6B (9th Cir. 1974); Kelly v. Smith, 485 F.2d 520 (5th Cir. 1970). Here the activities of oystering were banned as a direct result of the negligent acts of Newport News. The Fourth Circuit examines only cultivation. They place it in a vacuum. They then find that cultivation is a local concern while ignoring the overall nexus the wrong has to the traditional maritime activity of oystering.

The ban is on the harvesting of oysters. This, in effect, denies the petitioner the ability to engage in maritime commerce. By polluting the waters of a navigable river, the defendants interfered with the entire business of oystering. The damage-the crux of the injury is to the commerce of the seas.

The Circuit further departs from typical maritime jurisdiction analysis by indicating that because a traditional maritime activity has local connections it cannot provide the basis for maritime jurisdiction. The federal government has not ceded maritime jurisdiction because a matter is of local concern. The whole basis for admiralty is that uniform redress of maritime wrongs is sounder policy than local variances for those who are engaged in navigation and commerce of the seas. See Workman v. City of New York, 179 U.S. 552 (1900).

The lower courts locality reasoning is based on an archaic notion of commerce derived from McCready v. Virginia, 94 U.S. 391, 395 (1877). This Court just last term discredited McCready with respect to its view of commerce. See Douglas v. Seacoat Products, Inc. 45 L.W. 4491(1977) ft. nt. 16. Commerce was interpreted in a much more limited sense than used today. Perez v. United States,402 U.S. 146 (1971); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Wickard v. Filburn, 317 U.S. 111. Yet this antiquated view of commerce is the entire underpinning of the opinion by the Fourth Circuit.

Even the application of the Commerce clause to this factual situation is mistaken. The Fourth Circuit indicates that an otherwise maritime tort is of only local concern because Congress does not have the power to regulate fishing

activities based on a McCready nation of commerce. There is no reason to thrust an interstate commerce pronouncements in to the field of maritime commerce. Where the tort has a nexus to commerce of the seas, interstate or otherwife, the Constitution confers maritime jurisdiction to the federal courts.

Moore v. Hampton Roads Sanitation, 557 F.2d 1030 (4th Cir. 1977) presents an admiralty issue of great importance coming out of a Circuit where the oyster industry is prevelant. The opinion has far reaching effects not merely on the oyster industry, but for the entire fishing industry.

The contamination of the Warwick River by the City of Newport News was clearly an unconstitutional taking. The district court felt that there was,at best,only a negligent impairment of the petitioner's interest. The difference between an

"impairment" and a taking relates to the magnitude of the injury. Where the magnitude is great a taking occurs. The overflow totally deprived the oystermen of the use of their leasehold,warrantying compensation.

Hampton Roads is accountable for all the damage done to oysterland condemned adjacent to the sewage outflow line. Failure to provide compensation for all damage is contra to Supreme Court precedent. United States v. VEPCO, 365 U.S. 624(1961).

The courts below, in effect, overruled the holding in Darling v. Newport News, 123 Va. 14, 96 S.E. 307 (1918),aff'd, 249 U.S. 540 (1919); that there existed a common law right to dump sewage into tidal streams. Moore v. Hampton Roads, 557 F.2d 1030, 1033 (1976). This Court should clarify what effect this has on the utilization of the takings clause in

environmental pollution situations. The district court decision in the case at hand is not in align with lower court reasoning or Supreme Court precedent. The environmental considerations combined with the overruling of Darling make this an extremely important federal question.

ARGUMENT

1

OYSTER FISHING BEARS A SIGNIFICANT RELATIONSHIP TO TRADITIONAL MARITIME ACTIVITY, AND INTERFERENCE WITH THAT ACTIVITY OCCURRING UPON NAVIGABLE WATERS CONSTITUTES A MARITIME TORT.

Sweeping aside the rhetoric and confusion that had accompanied this case on its journey through the courts, one fact remains evident: it basically involves an action by oystermen against the City of Newport News and the Hampton Roads Sanitation District Commission to

recover damages for the negligent destruction of the ability to pursue their fishing, or harvesting, their livelihoods. And the sole question here to be dealt with is whether interference with the pursuit of that livelihood, occasioned by the discharge of untreated sewage into navigable waters of the Watwick River, gives rise to a cause of action within the admiralty and maritime jurisdiction of the federal courts.

The starting point for determining whether a tort claim is within the admiralty jurisdiction is undoubtedly Executive Jet, supra. There, the Supreme Court put an unequivocal end to the strict locality test of maritime tort jurisdiction, replacing it with a requirement that the wrong, even though it occurs upon navigable waters, "...bear a significant relationship to traditional maritime activity." 409 U.S. at 268. In attempting to describe

what activities bear such a relationship to traditional maritime activity, the Court first focused upon matters pertaining to maritime navigation, stating:

> "The law of admiralty has evolved over many centuries, designed and molded to handle problems of vessels relegated to ply the waterways of the world, beyond whose shores they cannot go. That law deals with navigational rules--rules that govern the manner and direction those vessels may rightly move upon the waters. When a collision occurs or a ship founders at sea, the law of admiralty looks to those rules to determine fault, liability, and all other questions that may arise from such a catastrophe ...409 U.S. at 269-270.

But, the admiralty has obviously not been concerned only with the navigational facets of the shipping industry. As further stated by the Supreme Court:

> "Through long experience, the law of the sea knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure. It is concerned with maritime liens, the general average, captures and prizes,

> limitation of liability, cargo damage, and claims for salvage." 409 U.S. at 270.

That these situations, including both maritime navigation and maritime commerce, were not intended to be all-inclusive is evidenced by the Court's immediately following observation that: "Rules and concepts such as these are wholly alien to air commerce..." 409 U.S. at 270, emphasis added. In short, Executive Jet altered only the strict locality rule of admiralty jurisdiction, and can in no way be interpreted as removing from that jurisdiction any matters historically related to either maritime navigation or commerce. Thus all such matters are today, as they were previously, within the admiralty jurisdiction.

The occurrence giving rise to the instant suit is the negligent release of untreated sewage into waters forming a part of petitioners' oyster beds, thereby

preventing the harvesting of oysters and their placement in interstate commerce. And, since that occurrence unquestionably had its adverse impact on navigable waters, the sole question left to be decided is whether it "...bears a significant relationship to traditional maritime activity." The activity interfered with is the seeding, fattening and harvesting of oysters; an activity carried out exclusively by the use of documented vessels manned with crews and which has as its purpose the capture of a species of marine life. The activity, in short, is fishing--different from any other types of fishing carried on in our coastal waters only in the method used in snaring the "catch", and in the fact that the oystermen assure a continuing supply of these shellfish by seeding the beds after they fish, or "harvest". To say that this

conservation and supply-assuring procedure removes this type of shellfishing from the realm of commercial fishing is tantamount to saying that logging on previously cut and reseeded tracts is something other than logging. And, if it is admitted that what the petitioner oystermen do is fish for shellfish, it seems axiomatic that their activity has traditionally been of concern to admiralty courts and is maritime in nature. Thus, in Union Oil, supra the court noted that were it necessary to do so--which it concluded was not--it would have no difficulty in finding that the oil pollution of coastal waters interfering with commercial fishing activities constitutes a maritime tort because:

> "In numerous ways, the fishing industry is clearly a part of traditional maritime activity; and to assert otherwise would amount to a repudiation of much of maritime history. For example,

> fishermen have been treated as seamen for purposes of enforcing their rights against the fishing vessel and its owner...and the vessels themselves have been the object of federal legislation designed to afford their owners many of the benefits which the law otherwise provides to maritime vessels generally..."

A District Court in the Fourth Circuit recently embraced that reasoning. See Potomac River Association, Inc. v. Lundeberg Maryland Seamanship School, Inc., 402 F. Supp 344 (D. Md. 1975). There, District Judge Young said:

> "Although dredging and filling are not traditional maritime activities, interpretation of Executive Jet indicates that the activity of the one injured, rather than the one injuring, must have a maritime nexus... That nexus certainly exists in relation to the Potomac River Association insofar as injury to commercial fishing has been alleged." 402 F. Supp at 358.

For similar post-Executive Jet authority, see Burgess v. M/V Tamano, 370 F. Supp 247 (D. Me. 1973); and State of Maryland,

Department of Natural Resources v. Amerada Hess Corporation, 356 F. Supp 975 (D. Md. 1973).

Respondents have attempted to place this occurrence on the periphery of the admiralty's jurisdiction, arguing that the destruction of petitioner's commercial fishing activities was a fortuitous consequence of their negligent acts; and that such shell-fishing endeavors are, like the crash of the ill-fated airplane into the marshes of Lake Erie in Executive Jet, matters that were formerly deemed within the scope of the admiralty's jurisdiction solely because of their maritime situs. Nothing could be farther from the truth. First, while it might indeed be fortiutous for a land-based airplane traveling between two points within the continental United States to crash into navigable waters, the same cannot be said of releasing pollutants

into streams feeding into the Warwick River and ultimately emptying into the waters of the Atlantic Ocean. It is as foreseeable that such pollutants will find their way into navigable waters, and cause whatever harm they have the potential for causing in those navigable waters, as it is that night will follow day. And, whereas, the crash of the Executive Jet airplane had no bearing upon either maritime navigation or commerce, and could only come within the scope of the admiralty's jurisdiction is situs alone was jurisdictionally dispositive, the same is not true of commercial fishing activities. The vessels used in these endeavors and the personnel engaged in these activities have traditionally and historically been deemed within the admiralty's jurisdiction even where a conceptual, and not merely a spatial, test has been applied. Thus, furnishers

of supplies to coastal fishing vessels have historically been afforded maritime liens; mortgagees of such vessels have been afforded preferred status pursuant to the Ship Mortgage Act; and members of the crews of such vessels have been entitled to recover for their illnesses and injuries pursuant to the maritime doctrines of maintenance and cure, seaworthiness, and the Jones Act, and have been afforded maritime liens for unpaid wages. See, for illustrative purposes, Osland v. Star Fish & Oyster Co., 107 F.2d 113 (5th Cir., 1939); Putman v. Lower, 236 F. 2d 561 (9th Cir., 1956); The Virginia Belle, 204 Fed. 692(E.D. Va. 1913); The Hiram Dixon, 33 Fed. 297 (E.D. N.Y. 1887); and W. F. Allen v. The M/V Contessa, 196 F. Supp 649 (S.E. Tex. 1961). It is significant that, even before Executive Jet, one whose claim was not conceptually within the ambit of the

of the admiralty's jurisdiction could not evoke any of the above remedies simply because the situs of his claim brought the matter within the admiralty's jurisdiction. Thus, while application of the strict locality test of tort jurisdiction occasionally worked before Executive Jet to bring swimmers within the jurisdiction of admiralty if they struck submerged pilings while emersed in navigable waters, no court applying the strict locality rule of admiralty jurisdiction ever permitted such a person to recover maintenance and cure or premise his action upon the maritime concepts of seaworthiness or Jones Act Negligence.[1] And, the

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[1]For a discussion of the now discredited strict locality rule of admiralty tort jurisdiction see Moore and Pelaez, 7A Moore's Federal Practice, ¶.325 (3);and Pelaez, Admiralty Tort Jurisdiction-The Last Barrier, 7 Duq. L.R.1 (1968).

supplier of the swimmer's bathing suit or snorkle gear most certainly did not possess a maritime lien! Those remedies, freely applied to all commercially fishing the inland and tidal waters, were reserved to persons engaged in or abetting maritime commerce or navigation and not extended to those who fortuitously were injured upon navigable waters while engaged in non-maritime pursuits. Thus, even before Executive Jet it was necessary that claims for these remedies be premised upon activities bearing a significant relationship to traditional maritime activities, and applying those standards, no court found such a relationship wanting in causes involving commercial fishing activities, whether shell fishing or fin fishing. There is nothing in Executive Jet, dealing as it does with a case that has always been on the periphery of the admiralty jurisdiction, to even

remotely suggest that such traditionally maritime pursuits as fishing are today to be wrenched from that jurisdiction and subjected to a confusing and often conflicting maze of state laws. This case, as was true in In Re Motor Ship Pacific Carrier, 489 F.2d 152 (5th Cir., 1974), U.S. cert den 417 U.S. 931 (1974), another case dealing with interference to maritime commerce caused by smoke emanating from shore,

> "...(I)s not one of those 'borderline' problem cases, alluded to in Executive Jet, devoid of any relationship between the tort and traditional maritime activities other than location." 489 F.2d at 155.

but instead involves interference on navigable waters with an activity historically and traditionally of concern to the admiralty.

There is nothing in the post-Executive Jet decision to the contrary. Thus, this Circuit in Richards v. Blake Builders

Supply, Inc. 528 F.2d 745 (4th Cir.,1975) refused to exclude pleasure boats from the admiralty jurisdiction because, even though not involved in maritime commerce, they are vessels in navigation which have been deemed within the admiralty jurisdiction for a variety of purposes, noting:

> "Thus, in at least three instances, the Supreme Court has treated pleasure boats as being within the admiralty jurisdiction, without a suggestion of any doubt about the matter. Nor did the Court, in Executive Jet Aviation, cast any doubt about its own prior holdings. It did not include those cases within the group of motorboat cases of which it did express disapproval. Under those circumstances, we do not think we can read Executive Jet Aviation as having overruled the earlier cases in the Supreme Court, or even as reopening the whole general question for reconsideration in the lower federal courts." 528 F.2d at 749.

Similarly, there is not a scintilla of evidence in Executive Jet to indicate that Court's displeasure with the plethora of pre-existing decisions holding commercial fishing activities to be

legitimately within the concern of the admiralty, whether occurring in territorial waters or upon the high seas. As so astutely observed by this Court, Executive Jet dealth only with a matter of no traditional concern with either maritime navigation or maritime commerce, and only as to such matters did it conclude there was no maritime nexus. That decision cannot be read as excluding from the traditional jurisdiciton of the admiralty matters clearly pertaining to either maritime navigation or maritime commerce. If a relationship to either such activity is found to exist, admiralty--as always--must yet be deemed to have jurisdiction.

Senior Judge Field, dissenting on the panel decision, has suggested that "...the cultivation of oysters is not a traditional form of maritime commerce and navigation.." Moore, supra at 1035, sufficient to support admiralty jurisdiction. However,

cultivating oysters--as is true of any other type of fishing enterprise--can only be done with the use of vessels and crews that historically have been deemed within the admiralty jurisdiction and subjected to the admiralty's substantive rules, regulations and laws. And, it is those historically maritime activities that are interfered with when negligently caused water pollution destroys oystering. The significance of a full recognition of the types of activities affected by the tortious conduct is illustrated in Kelly v. United States, 531 F.2d 1144 (2nd Cir. 1976) where the cause of action was based upon the Coast Guard's alleged failure to come to the rescue of pleasure boaters. That Court, troubled with the problem of including pleasure boats within the jurisdiction of the admiralty, refused to take the bait which would have compelled

it to resolve that question, recognizing that the real question was whether Coast Guard rescue operations bear a significant relationship to traditional maritime activities and not whether pleasure boats are within that jurisdiction. As stated by the Court:

> "We believe...that this suit is not merely a 'pleasure boat accident case.' In fact, the case only tangentially involves boats at all. It primarily involves water rescue operations. The objects of the rescue could just as well have been fatigued swimmers as capsized boaters. The critical question, therefore, is not, as both parties have tended to frame it, whether pleasure boat cases fall within admiralty, but rather rescue cases involving the United States Coast Guard fit within this category. Viewing the case in this way, we conclude that rescue operations of the Coast Guard conducted on navigable waters to in fact bear a significant relationship to traditional maritime activities for purposes of admiralty jurisdiction. 531 F.2d at 1147.

So, too, here it is of critical importance that petitioners interference with the cultivation of oysters also

also interferes with activities historically and traditionally within the scope of the admiralty's jurisdiction.

A factual situation virtually identical with the one at hand also coming out of the Eastern District of Virginia was presented by Robert R. Wilson v. United States of America, et al, Civil Act No. 76-28-N. District Judge Calvert Clark, in an unpublished opinion dated August 11, 1976, ruled the sewage polluting acs of the defendnat were maritime in nature. In that case it was alleged that inadequately treated sewage was discharged in the Lynhaven River and its tributaries causing closing of the area to commercial oystering. The Judge indicated that:

> "The sufficiency of the nexus between the alleged wrong and maritime activities is tested by an examination or the activities of the injured party. This was the approach utilized in Executive Jet Aviation and since adopted by several lower federal courts. Executive Jet Aviation, Inc.

> v. City of Cleveland, 409 U.S. 249, 272 (1972); Union Oil Company v. Oppen, 501 F.2d 558, 561 (9th Cir. 1974); Oppen v. Aetna Insurance Co., 485 F.2d 252, 257 (9th Cir. 1973); Potomac River Association, Inc. v. Lundeberg Maryland Seamanship School, Inc., 402 F. Supp 344, 358 (D. Md. 1975). The plaintiffs are commercial oystermen who possess leasehold interests in certain oyster beds owned by the Commonwealth of Virginia. The oystermen cultivate and market oysters as a livelihood. In pursuing their occupation, the plaintiffs use vessels to travel the navigable waters of the Lynnhaven River System. Consequently, the plaintiffs are subject to the United States navigation regulations, 33 U.S.C. §154, et seq. The use of water-borne vessels on navigable waters is clearly a traditional maritime activity. St. Hilaire Moye v. Henderson, 496 F.2d 973, 979 (8th Cir. 1974). Robert V. Wilson, supra 8,9.

And, it is the harm caused by being prevented from undertaking the traditionally maritime activities of fishing for, or "harvesting," oysters, and placing them in interstate commerce, for which petitioners seek redress. Thus, that some facets of the oystering business may

be outside the admiralty's jurisdiction is no more dispositive of whether the harm alleged in this case constitutes a maritime tort than would be the fact that a pleasure boat is outside the admiralty jurisdiction where the tort alleged involved the negligent performance of a Coast Guard rescue; or that a contract to build a vessel is outside the admiralty jurisdiction in determining whether the subsequent interference with that vessel's navigation constitutes a maritime tort. The sole relevant question in both the hypothetical situation and in the instant case is whether the tort adversely affected activity traditionally of concern to the admiralty and had its impact upon navigable waters. So long as the cultivation of oysters requires the use of ships and their crews, it involves maritime commerce. And interference with maritime commerce has traditionally

constituted a tort cognizable within the jurisdiction of the admiralty. A full examination of the scope of defendants tortious acts and the activities with which those acts interfered illustrates the accuracy of the observations of the majority of the Panel originally hearing this cause when it remarked:

> "Harvesting oysters and clams, like fishing, is a traditional maritime activity; the cultivation of oysters is so closely related to the harvesting of oysters that interference with cultivation which impairs harvesting also meets the situs and nexus tests established by Executive Jet."

II

THE POWER TO REGULATE MARITIME COMMERCE AND NAVIGATION IN VIRGINIA TERRITORIAL WATERS HAS NOT BEEN CEDED TO THE COMMONWEALTH OF VIRGINIA, AND REPOSES IN THE FEDERAL COURTS EXERCISING THEIR ADMIRALTY AND MARITIME JURISDICTION.

It has been clear since the Supreme

Court's decision in the Genesee Chief v. Fitzhugh, 12 How. 443 (1850) if not before, that all navigable waters used for purposes of maritime commerce and navigation are within the admiralty jurisdiction and that torts occurring thereon and having a relationship to traditional maritime activity are maritime. And, it makes no difference whether those waters are within or without the boundaries of any state.

There is nothing in Smith v. Maryland, 59 U.S. 71 (1855); McCready v. Virginia, 94 U.S. 391 (1876); Manchester v. Massachusetts, 139 U.S. 240 (1891); or in the Submerged Lands Act of 1953, 43 U.S.C. §1301, et seq., capable of supporting a conclusion that the admiralty has relinquished its long-standing jurisdiction over maritime torts occurring in territorial waters.

The cited cases deal with the validity

of state statutues regulating coastal fishing in an effort to preserve resources held in trust by the states. Those decisions make it clear that the fish resources in the territorial waters are owned by the various states and that the states are free to promulgate and enforce regulations governing the capture of those resources. But, as stated by the Supreme Court in Manchester v. Massachusetts, supra,

> "...there is no necessary conflict between the right of the State to regulate the fisheries in a given locality and the right of the United States to regulate commerce and navigation in the same locality." 139 U.S. at p. 262.

Thus, while all of the cited cases--and numerous others--make it abundantly clear that states own and can control the methods of harvesting fish, the times when such fish may be harvested, the quantities and sizes of fish that can

be harvested, etc., no decision has yet so much as hinted that this brings within the state's jurisdiction matters traditionally of concern to the admiralty simply because fishing in state territorial waters is involved. Thus, longshoremen and shiprepairers injured on vessels engaged in fishing territorial waters are not subject to state Workmen's Compensation Laws, but are embraced within the scope of the Longshoremens' and Harbor Workers' Compensation Act. And, the crews of territorial water fishing vessels are not limited to the benefit of state laws, but are clearly entitled to the protection afforded by the Jones Act and the general maritime law doctrines of maintenance and cure and seaworthiness--none of which remedies are afforded by the law of any state. Nor is there today any doubt that those furnishing supplies to vessels fishing the territorial waters, the

mortgagors of such vessels, and unpaid crew members serving aboard those vessels, are within the ambit of the Federal Maritime Lien Act and the Ship Mortgage Act, and not limited to state created rights.

All of this illustrates that while states do own the fish resources in their territorial waters, and have the power to regulate the harvesting of those resources for the common benefit, many aspects of that harvesting do not bear upon the state's ownership and regulatory powers, are of traditional concern to maritime commerce and navigation, and must yet be governed by uniform principles of admiralty law. The Fourth Circuit in the case at bar held that the interests of the plaintiff were purely local in their nature and, therefore, the impairment of their interests falls within the state jurisdiction and not admiralty. No

authority whatsoever is cited for this view of tort jurisdiction. An analysis of Smith, Menchester, and McCready reveals the fallacy in the "locality reasoning" enunciated by Justice Field. It has long been settled that the states surrendered jurisdiction over admiralty matters. United States. United States v. Bevans. Justice Curtis in Smith v. Maryland described the limits of state power very clearly. Their power stops at the point where their jurisdiction conflicts with maritime jurisdiction. Before determining whether the interest is local, one must first determine whether the tort is within admiralty's jurisdiction. If the jurisdiction exists under the commonly accepted tests, then the local interest is not at all relevant. The desire for uniform application of maritime redress of wrongs overrides any local interest. The threshold question is whether admiralty

jurisdiction exists. Once determined that it exists, case law tells that otherwise purely local matters are of national concern because of its admiralty nature.

Even the Fourth Circuit's analysis that the nature is a purely local matter is highly questionable. The reasoning from a interstate commerce principle enunciated in McCready v. Virginia concluded that ovster cultivation is purely a local activity and therefore a tort preventing oyster commerce on the Warwick River was purely local. This concept of commerce has been repudiated repeatedly and most recently by This Court in Douglas v. Seacoast Products, 45 L.W. 4488 (1977) with Justice Marshall observing:

> "While appellant may be correct in arguing that at earlier times in our history, there was some doubt whether Congress had power under the Commerce Clause to regulate the taking of fish in state waters, there can be no

> question today that such power exists where there is some effect on interstate commerce. Perez v. United States, 402 U.S. 146 (1971); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Wickard v. Filburn, 317 U.S. 111 (1942).[2]

The relevant question, the, becomes whether the grant of ownership of the fish resources in the territorial waters of the Commonwealth of Virginia, together with the power to control the appropriation of those fish resources, is broad enough to bring the tortious conduct alleged in the instant law suit within the ambit of Virginia's substantive law. We believe that both case precedent and a careful reading of the entire Submerged Lands Act compels a negative answer to this question.

The question of whether Virginia or

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[2] McCready v. Virginia, supra was specifically cited by Justice Marshall at Ft. Nt. 16 in Douglas.

federal maritime law should govern the tortious conduct in the instant case involves a determination of the breach of the regulatory and ownership power ceded to or possessed by the Commonwealth of Virginia and is thus a matter to be determined by the federal courts applying federal law. As stated by the Supreme Court in Borax, Ltd. v. Los Angeles, 296 U.S. 10, 22 (1935):

> The question as to the extent of a federal grant, that is, to the limit of the land conveyed, is necessarily a federal question; ...it involves the ascertainment of the essential basis of a right asserted under federal law.

THE COURT also makes it clear that the perimeters of the State's powers are not likely to be different depending upon whether the older case precedent or the Submerged Lands Act is deemed to apply, noting that:

> "The Submerged Lands Act of 1953 did

> did not disturb these doctrines or their inherent limitations. The Act merely confirmed the State's pre-existing rights in the beds of navigable waterways within their boundaries by, in effect, quitclaiming all federal claims thereto." Bonelli v. Cattle Co., 414 U.S. 313,318, (1973) (rev'd for other reasons) State Land Board v. Cornwallis Sand & Gravel Company, 45 L.W. 4105, 4107, ft. nt. 4;See also Oregon ex. rel.

Thus, it is not necessary to determine whether the 1953 Act in effect overruled the earlier case precedents. Both the earlier cases and more recent precedents examining the breadth and purposes of the Submerged Lands Act are persuasive authority.

The most recent in depth study of this problem, undertaken by the Court of Appeals for the Fifth Circuit in Zabel v. Tabb, 430 F.2d 199 (5th Cir., 1970), cert, den, 401 U.S. 910 (1971), amply illustrates that the boundaries of the State's powers must be limited by the purposes the grant

of ownership and regulatory control was intended to fulfill. In Zabel it was argued that the Submerged Lands Act prevented the federal government from enjoining a dredging operation harmful to the ecology of navigable waters overlying submerged lands. The challenging landholders argued that the Congressional relinquishment of title to the submerged lands together with the right and power to manage and use the land except for purposes relating to navigation, flood control and hydroelectric power, caused all other matters pertaining to these lands to repose in the States. In rejecting this contention Chief Judge Brown said:

> "...(T)his argument ignores both language found elsewhere and the legislative purpose of the Act. The controversy, often pressed with emotional overtones, was over oil and gas and whether the states were to reap the economic benefits of development royalties and to regulate the exploration

and development or whether these benefits and these controls were to be exercised by the Federal Government as an adjuct of then newly declared 'paramount rights'...The Act and this relinquishment reflect the legislative compromise found in the combination of the Submerged Lands Act and Outer Continental Shelf Act. The adjacent states were to be the 'owner' of the resources and reap exclusively in the economic benefits of resources in the tidelands and have full control over management and exploitation. The Federal Government, on the other hand, was given exclusive ownership and control vis-a-vis the states in the Outer Continental Shelf." 430 F.2d at 205.

Thus, the states were interested in the ownership of the affected resources and in the power to regulate the appropriation of those resources, not in narrowing the admiralty's jurisdiction or in bringing aspects of maritime commerce within their control. In part because it looked to the purposes behind both the case precedent and the Submerged Lands Act, the Court in Zabel clearly thought the express reservations of federal power set forth

in 43 U.S.C. §1311(d) were not intended to be all inclusive, with all other powers reposing in the states, but were intended only to eliminate"...these frequent and extensive activities as a source of further state versus national controversy." 430 F.2d at p.205. The Court also noted that any doubt that these express reservations were not intended to be all inclusive was erased in a subsequent section of the Act, which provides:

> "The United States retains all its navigational servitude and rights in the powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311

of this title." 43 U.S.C. §1314 (a). Emphasis added.

These expressly reserved powers seem clearly to go beyond the three powers reserved in Section 1311 (d) of the Submerged Lands Act, and the Court of Appeals for the Fifth Circuit so construed them, stating in a footnote:

> "But we have already shown that the enumeration of these three, (reserved powers) which are explicitly stated because they are particularly relevant to the regulation of land lying under navigable waters, does not imply that Congressional power over other typies of commerce was among the rights relinquished....
>
> "To hold otherwise would render the reservation of constitutional commerce power in §1314(a) a useless reiteration of the impliedly retained powers in §1311(d). But to hold that it is an explicit reservation of all commerce powers gives the section meaning. The section may be unneeded and overly cautious in that it reserves a constitutional power that has (not) been relinquished, but it should not be read in such a way as to render it otherwise useless." 430 F.2d at p. 206. Material in brackets added.

The conclusion reached by the Fifth Circuit in Zabel v. Tabb makes good sense and coincides with the earlier Supreme Court precedents that the States own and have the power to regulate the appropriation of marine resources in their territorial waters. What was of critical importance and most likely hotly contested at the time of those decision--as was true at the time of the enactment of the Submerged Lands Act--was not whether state or federal principles of substantive law should govern all aspects of the fishing or oil industry, but whether the fish and iol resources in and under the submerged lands and their overburden of navigable waters belonged to the adjacent States or to the Federal Government. And, the regulatory controls asserted by the States have in all instances dealt only with the appropriation

of those assest--both the manner in which such resources could be appropriated and with the persons permitted to undertake such acts of appropriation, and have never been asserted to oust the admiralty of jurisdiction over torts occuring in those waters or over contracts governing such fishing enterprises. Thus, Smith v. Maryland, supra, dealt with the validity of a state statute prohibiting the capture of oysters by scoop or drag; McCready v. Virginia, supra, dealt with whether Virginia could prohibit citizens of other states from planting oysters in the Ware River; and Manchester v. Massachusetts, supra, dealt with the validity of a state statute prohibiting the use of nets while fishing in territorial waters. Not one of those decision, nor any others, indicate that the states can enact laws governing the rights of seamen injured in fishing ventures carried out in territorial

waters, or laws governing contracts entered into by the owners of those vessels with their crews and suppliers. It is thus both significant and revealing that, Smith, McCready, and Manchester notwithstanding, it has quite obviously always been assumed that maritime law applies to the vessels and their crews engaged in the business of appropriating these maritime resources which have been ceded to the states, and that the power of the states to regulate and control the appropriation of these assets does not remove from the jurisdiction of the admiralty matters that do not touch upon the ownership or manner of appropriating such resources and which otherwise qualify as maritime in nature. Thus, the early case precedents are entirely consistent with the conclusion of the Court of Appeals for the Fifth Circuit in Zabel v. Tabb, supra, that state ownership of the involved

resources does not preclude the federal government from controlling activities in the affected area which do not affect the state's ownership rights and are of primary concern to a federal interest, such as maritime commerce and navigation.

Clearly, the Commonwealth of Virginia owns the submerged lands beneath which plaintiffs fished, and all natural resources contained therein. And, just as clearly, the Commonwealth has the undoubted power to regulate the manner in which the marine life contained in those waters can be harvested and to restrict the conveyances of leaseholds in those waters. That ownership and power does not, however, obviate the fact that these harvesting operations--once permitted by the Commonwealth--are undertaken through the use of documented ships peopled with seamen sailing upon navigable waters, and that the catches

once made are placed directly in interstate commerce. Once the Commonwealth of Virginia determines how the oysters are to be cultivated and harvested, and by whom, its concerns are fulfilled and the only interests yet remaining are the admiralty's interest in maritime commerce. And the admiralty has never left resolution of matters affecting these interests to state determination. The admiralty has always concluded that there is a need for national uniformity in resolving matters intimately intertwined with maritime commerce and navigation, as evidenced by the fact that it has consistently provided remedies for injuries caused by tortious conduct within its jurisdiction, and has not usually left redress for such injuries to the adjacent states. As stated by the Court in Adams v. The Montana Power Company, 528 F.2d 437 (9th Cir. 1975):

> "The strong federal interest in fostering commercial maritime activity outweighed the interest of any state in providing a forum and applying its own law to regulate conduct within its borders." 528 F.2d at p. 439.

For a recent illustration of this policy's implementation, see Moragne v. States Marine Lines, 398 U.S. 375 (1970), establishing a remedy for wrongful death acts that had previsouly been used to fill the void. Redress of torts bearing a significant relationship to traditional maritime activity--such as fishing--has long been a matter of concern to the admiralty and can only be governed by state laws where the admiralty has not seen fit to promulgate uniform substantive laws or, occasionally, where the state provides a remedy in excess of those provided by the maritime law. As stated by Professors Gilmore and Black:

> "...(T)he states may not flatly contradict established maritime

> law, but may 'supplemen' it, to the extent of allowing recoveries in some cases where the maritime law denies them;...states may legislate freely on shipping matters that are of predominantly local concern, but that they may not so act as to interfere with the uniform working of the federal maritime legal system." Gilmore and Black, The Law of Admiralty (2d 3d., 1975) at p. 49-50.

The admiralty has developed a scheme of substantive laws governing torts interfering with or destructive of maritime commerce and navigation, and has not left these matters for local determination. And, those substantive laws have been applied to situations, such as the instant case, where the interference is caused by the destruction of fish essential to the successful carrying out of commercial fishing enterprises. See Union Oil Company v. Oppen, 501 F.2d 558 (9th Cir. 1974); State of California, By and Through its Department of Fish and Game v. S.S.

Bournemouth, 307 F. Supp. 922 (C.D. Cal. 1969), and the authorities cited therein. Thus, it can hardly be said that regulation of torts causing interference with maritime commercial activities is a matter of purely local concern which the admiralty has been content to leave to the states. The tortious conduct here, while its immediate effect was to destroy oysters, had a direct and readily foreseeable impact upon the operations of the vessels and their crews engaged in harvesting those oysters, and thus directly interfered with an aspect of maritime commerce long deemed within the jurisdiction of the admiralty. And, the admiralty has long provided remedies for tortious interference with maritime commerce and navigation. See Carroll v. Protection Maritime Insurance Co., Ltd., 512 F.2d 4 (1st Cir. 1975). There, in holding that the blacklisting of seamen constituted a maritime

tort within the jurisdiction of the admiralty, the Court said:

> "The tort alleged in this case seems to be so interwoven with present and potential maritime contractual relationships--traditional concerns of the admiralty--as to fall within that jurisdiction. Moreover, as we have noted, the impact of such a tort as this, while felt by the blacklisted seamen, is equally manifest in the operation of the affected vessels." 512 F.2d at 8-9. Emphasis added.

So too, here, the tort of polluting the oyster beds is interwoven with maritime commerce and navigation and has its impact upon the ability of plaintiffs to successfully perform those purely maritime functions. Neither case precedent nor the Submerged Lands Act give any indication that those purely maritime functions are to be included in the powers and assets ceded to the states notwithstanding, matters of traditional concern to the admiralty,

and must be governed by uniform admiralty principles. It cannot be presumed that the Courts or the Congress, in recognizing the right of the states to own and regulate the appropriation of the assets in their territorial waters, intended to carve out of the admiralty's traditional jurisdiction matters bearing a significant relationship to maritime commerce and navigation simply because they occurred in those territorial waters. Surely, had so broad an intrusion upon the admiralty's jurisdiction been intended it would have surfaced long before this case. Yet, no precedent compels, nor would sanction, this conclusion--a conclusion that would put jeopardy in large volumes of admiralty precedent involving matters occurring in these territorial waters.

The torts committed by defendants in this case do bear a significant relationship to maritime commerce, and are thus

maritime in nature. Moreover, they involve interference with a traditional and widespread facet of maritime commerce--fishing in territorial waters--and it is important that all such tortious activity, regardless of where it occurs, be governed by the same legal principles and not left to a conflicting array of disparate state laws. These matters must, therefore, be governed by uniform principles of maritime law.

III

THAT THE CONTAMINATION OF THE WARWICK RIVER CONSTITUTED AN UNCONSTITUTIONAL TAKING WITHIN THE PURVIEW OF FEDERAL AND STATE CONSTITUTIONAL STANDARDS.

A. The deprivation of the use of the oyster beds is tantamount to a taking.

It is generally held that a taking occurs whenever the government acts in such a way as to substantially deprive an

owner of the useful and beneficial interest in that which he owns. The Court below, held that the negligent activities of the city in repeatedly dumping sewage into the Warwick River causing the closure of the osyter beds were at best nothing more than a negligent impairment, not subject to due compensation. With this the petitioners disagree. The overflows totally deprived the oystermen of the only reasonable use of their property and can only be viewed as an unconstitutional taking without just compensation.

Property is taken when inroads are made upon an owners use of it to the extent that a servitude has been acquired by agreement or in the course of time. U.S. v. Dickinson. 331 U.S. 745 (1947). Intermittent flooding can result in such a servitude as can repeated trespass by government directed projectiles

Portsmouth Harbor v. U.S. 260 U.S. 327(1922). Government inroads on private property minor enough not to amount to a servitude are labeled mere torts and therefore damages are consequential and not compensable. The distinction drawn is between mere tortious invasion of one's property rights and an appropriation of sufficient magnitude to amount to a taking. Harris v. U.S., 467 F.2d 801 (8th 1972). It is not a mere tortious invasion when the injury rises to the magnitude of an appropriation of some interest in that property to the government. National By-Product v. U.S., 405 F.2d 1256 (C.Cl.1969). The Fourth Circuit in Ballard v. Glaser, 424 F.2d 473 (4th Cir.1970) recognized this same distinction between a tort and a taking. Judge Butzner, speaking for the Bench, stated that government action results in a taking of property rather than a simple tort if the effects are so

complete as to deprive the owner of all or most of his interest in this property. The oystermen have been permanently deprived of the sole reasonable use of their oyster bed as a direct result of the repeated failure of the City sewage disposal system. Rather than being a negligent impairment or a tortious invasion, the City of Newport News has imposed an involuntary servitude upon the oystermen. The repeated actions of the city ousted them from the use and enjoyment of their property and amounted to a taking. See U.S. v. Causby, 328 U.S. 256 (1947).

The pollution of a stream making it unfit for use is a taking for which compensation must be paid. Sandusky Portland Cement Co. v. Dixon Pure Ice Co., 221 F200 (7th Cir. 1915); Crane v. Brintnall, 278 NE2d 703. Interference, which destroys or substantially impairs property use or

value, is a taking for due process purposes. The City's discharge of pollutants into the Warwick has caused the continual condemnation of the oyster beds obliging the City to compensate the lessees of the beds.

The contamination of the River by the City is the reason for the oyster beds continual condemnation pursuant to preexisting FDA and health code standards. The health standards were in effect long before the City's pollution occurred; the standards are based on reality not fiction; the contamination is real and comports with scientific data. The oyster bed lessees are entitled to compensation for their losses regardless of whether the losses are caused by preexisting regulations and laws, or by actual harm. P. Nichols, Eminent Domain, §6.37 p. 1102. The health regulations preexisted the contamination by the City; and City

contamination made the beds subject to closure pursuant to health regulation standards. It is the proper non-compensable use of police power to destroy dangerously diseased trees. Miller v. Shoene, 276 U.S. 272 (1928). The Miller reasoning doesn't apply however if the infection itself is caused by unreasonable governmental conduct, as is the case here. The oystermen here are not alleging that the FDA or health standards are unreasonable or improperly applied to them; they have proven to the satisfaction of a jury that the City improperly caused the regulations to be applied. The City's conduct in this regard constitutes a compensable "taking" pursuant to due process standards.

B. That a taking of property can be negligently as well as deliberately caused.

Assuming that the City's contamination

of the River was the result of negligent rather than deliberate acts does not mean that the contamination was not a taking within the ambit of the Fifth Amendment. Federal Courts recognize that despite a lack of intent to acquire any property, certain governmental actions ential substantial invasion of private property interest for which a taking will be implied. See, e.g. Goldblatt v. Hempstead, 369 U.S. 590(1962), U.S. v. Kansas City Life, 339 U.S. 799 809-810. (1950), Portsmouth Harbor Land and Hotel v. U.S., 260 U.S. 327 (1922). Destructive activities within the scope of governmental authority can provide the basis for a taking even where they are carried on in a manner which can be characterized as imprudent, wrongful, or mistaken, Eyherbide v. U.S., 345 F.2d 565,570 (C.Cl.1965) C.F. Larson v. Domestic S. Foreign Commerce Co., 337 U.S.

682,689,692,693-695,703 (1949); Forest of Dean Iron Ore Co. v. U.S., 65 F. Supp 585 (1946); Siberman v. U.S., 71 F. Supp 895 (D. Mass 1941). The Fourth Circuit recognized that government activities negligently engaged in depriving an owner of his property interest can support an implied taking. Ballard Fish & Oyster v. Glaser Const. Co. 424 F.2d 473 (4th Cir. 1970). In Ballard the Court ruled that negligence in the destruction of oyster beds by government action in connection with the laying of pipeline could warrant just compensation. The City of Newport News negligent acts were directly connected to the authorized construction and maintenance of the sewage disposal systems and therefore are a taking.

Where a direct physical invasion is a foreseeable result of a government action, loss caused in not consequential and a

taking is implied. Eyherbide v. U.S., 345 F.2d 565, 570 (Ct. Cl, 1965). CF U.S. v. Dickinson, 331 U.S. 745, 751 (lack of prudent care was part of basis for compensation) CF B. Amusement Co. v. U.S., 180 F. Supp 386 (1960 Ct. Cl).

Sanguinetti v. U.S., 264 U.S. 146 (1924) is not inconsistent with the view that the negligent acts of Newport News amounted to a taking. Sanguinetti involved flooding damage which was allegedly caused by government construction of a dam. The Court would imply no taking in the absence of a showing that the flooding was a direct and necessary result of the structure, or that it was within the contemplation of, or reasonably to be anticipated by the government so as to amount to an appropriation of and not merely an injury to the property. In Sanguinetti the engineers building the structure utilized reasonable care in the

planning stages and were in no way guilty of negligence. The jury in the instant case determined that Newport News could reasonably anticipate that their actions might result in injury to the oystermen and found that the city was negligent in the maintenance and construction of the sewage system. The overflow of sewage deprived the oystermen of the only reasonable use of their property amounting to an appropriation and not to a mere injury. See U.S. v. General Motors Corp., 323 U.S. 373 (1949).

The provision against takings in the Virginia Constitution is more liberal than the federal constitution. The Virginia Constitution has expanded the necessity of compensation to include the damaging of private property for public use, §58 VA Constitution. This addition to the wording of a "taking" provision imposes a liability for consequential injuries.

See P. Nichols Eminent Domain. The Supreme Court in Virginia has held that irrespective of the issue of negligence, private property is taken or damaged for public use by a state agency clothed with the power of eminent domain, the owner is entitled to compensation. Heldt v. Elizabeth Tunnel District. 196 VA 477, 84 S.E.2d511 (1954); 203 VA 196, 123 S.E.2d 398 (1962). So even if the injuries to the oystermen are viewed only as consequential or indirect, compensation is still demanded under the Virginia Constitution.

To be distinguished from Heldt is Erickson v. Anderson, 79 S.E.2d 597, which held that Virginia will not be liable under the taking provision of Virginia Constitution for negligent acts of its officers and servants committed in connection with construction of public improvements. Read broadly, the case seems

to hold that all negligent acts of public officials or agents cannot be regarded as actions of the State for which a taking can be implied. The case, however, must be limited to its facts if it is to be consistent with other Virgina eminent domain cases.

In Erickson the damages were caused by the "careless, reckless and wanton acts of the State Highway Commission through its servants, agents and employees." Supra at 599.

The Court reasoned that there was nothing whcih authorized the officers or agents of the state to commit wrongful acts and therfore tortious conduct could not be regarded as acts of the government which could imply a taking. Tortious acts by the instrumentalities of the state, however, have, in the past, been construed as sufficient to support a taking under the Virginia Constitution.

When first construing the damaging aspect of the takings provision, the Virginia Supreme Court stated in Nelson County v. Loving, 126 VA 283, 161 S.E. 406 (1919), that the states failure to give consent to being sued on an action based on Tort would prevent claims of damage for personal injuries, but not for property damage. The Court cited with approval a California decision whic permitted compensation for injuries caused by the neglect of officers and agents of the State, Tyler v. Tehama City, 109 Ct. Cl.618, 42 Pac. 240, Nelson at 410. Heldt decided later in the same year as the Erikson case found no difficulty with permitting compensation where there were acts of ordinary negligence perpetrated by an agent of the state damaging private property. The difference in Erickson is that the acts of the agents and the employees were so wanton and reckless that

one could not say that they were the acts of the State. In contrast, it is proper to imply a taking for ordinary acts of negligence in the construction or everyday operation of a public project. C.F. Granone v. City of Los Angeles, 42 Cal. 34, 47.

C. Hampton Roads Sanitation District is Liable for all damage done as a result of condemning oyster land underneath a sewage outflow line.

The deprivation of the use of the oystermen's leasehold by causing them to be subject to police power regulations which closed the oyster beds to harvesting is an unconstitutional taking. The government is liable for all direct damages which occur as a result of eminent domain proceeding. Property which is not taken in a condemnation proceeding must be paid for if it is destroyed as a direct result of the

condemnation. The Sanitary District was fully aware of the state and FDA's precautionary procedures in prohibiting the oystering of lands adjacent to sewage outfall lines.

The Sanitary District was, however, in need of the land immediately under the outfall line and used their power of eminent domain to condemn it and compensate the owners. Rather than using their power of eminent domain to condemn the entire area deprived to the oystermen, the District only condemned the land physically underneath the outfall line. It was a direct and necessary result of this governmental project that the police power of the state had to be implemented prohibiting the sole reasonable use the oystermen had for their property.

The state's reasonable use of the police power in prohibiting the oystering in the area referred to as the buffer zone is not

challenged by the oystermen. It is instead the actions of the District which effectuated the deprivation of the oystermen's interest which is challenged.

The District Court Judge in this case noted that damage caused by the use of **state** police power when regulating the use of property does not constitute a taking. This is undisputed, and if no other governmental entity were involved, except the State Health Department, there would be no taking. But this is not the mere use of the police power which has substantially impaired the property rights. It is the action of Hampton Roads in building an outfall line on the property which caused the imposition of the regulations. As pointed out in Nichols' treatise on Eminent Domain subjection to police regulation as a result of taking demands compensation:

"If, as a result of a taking, it

> is made a subject to laws which it was not subject before, and such laws affect its value, the owner is entitled to be compensated for the decrease thus brought about, because it is a direct result of the taking of his land by eminent domain, regardless of whether the laws which will impair its use are natural laws or police regulations." 6.37 p.1102.

Indeed, it is widely recognized that where only part of a tract is taken in the exercise of the power of eminent domain, the owner is entitled to recover damages, not only for the part taken, but also for injuries to the residue. 29A C.J.S. 139; U.S. v. Vepco,365 U.S. 624. The Virginia Supreme Court makes it clear that "...In ascertaining such damages, every circumstance, present or future, which affects its then value may be considered." Part of the oyster bed was taken, directly causing the imposition of police power regulations which destroyed the value of the remainder not taken. Colonial Pipeline v. Lohman 207 VA 775,

152 S.E. 2d 34 (1967).

Even if the injury to the oyster beds was viewed as indirect and consequential, the State Constitution of Virginia demands compensation. Consequential damages are recoverable under Section 58 of the Constitution of Virginia where the injury was the proximate result of action of the State. Heldt v. Elizabeth Tunnel District, 196 VA 477, 84 S.E. 2d 511,514-15. The buffer zone's creation, preventing oystering, was directly caused by the installation of the outfall line. Compensation is mandatted by both the federal and state constitutional provisions.

CONCLUSION

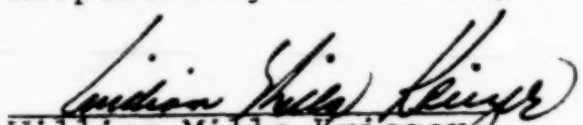
This case involves tortious interference with an activity of traditioanl concern to the admiralty. Moreover, the tortious conduct had its impact upon navigable waters of the United States. Thus, by any

test or standard, the tort is maritime in nature and within the admiralty and maritime jurisdiction of the federal courts. That the resources in these navigable waters have been ceded to the adjacent states does not alter the fact that the activity interfered with is maritime, and thus of primary concern to the federal courts and subject to its uniform admiralty law. For these reasons, the opinion of this Court should be affirmed.

In this case the Fourth Circuit has made a drastic departure in admiralty jurisdiction analysis. That the resources in the navigable waters where the maritime tort occurred have been ceded to the adjacent states does not alter the fact that the activity interfered with is maritime and thus of primary concern to the federal courts and subject to its uniform admiralty law. The circuit has decided the takings

issues contrary to other federal court and State Supreme Court reasoning. Wherefore Petitioner prays that the decision of the Court of Appeals for the Fourth Circuit be reversed and remand to the District Court for trial on the merits.

Respectfully submitted,



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I hereby certify that pursuant to Rule 33 of the Rules of the Supreme Court of The United States that I mailed a true and correct copy of the foregoing to all Counsel of Record by depositing the same in a United States Mailbox, with First Class Postage Prepaid, addressed to Counsel of Record at his Post Office Address this 11 TH day of October, 1977.

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